

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** PCB RORS 16-02 Ratification of administrative rules of the Board of Medicine

**SPONSOR(S):** Rulemaking Oversight & Repeal Subcommittee

**TIED BILLS:** **IDEN./SIM. BILLS:**

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<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR or BUDGET/POLICY CHIEF</b>
Orig. Comm.: Rulemaking Oversight & Repeal Subcommittee		Rubottom	Rubottom

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**SUMMARY ANALYSIS**

The Board of Medicine has adopted amendments to the rule regarding costs of reproducing medical records. The rule sets out the maximum reasonable cost per page reproduced that a physician may ask of the party requesting the medical records.

The Statement of Estimated Regulatory Costs showed Rule 64B8-10.003, F.A.C., *Costs of Reproducing Medical Records*, would have a specific, adverse economic effect, or would increase regulatory costs, exceeding \$1 million over the first 5 years the rule was in effect. Accordingly, the Rule must be ratified by the Legislature before it may go into effect.

The Rule was adopted on December 9, 2015, and submitted for ratification on December 10, 2015.

The proposed bill authorizes the Rule to go into effect. The scope of the bill is limited to this rulemaking condition and does not adopt the substance of any rule into the statutes.

The bill is effective upon becoming law.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Medical Records Charges

Health care practitioners must regularly provide copies of patient records for use by the patient, insurers, other medical professionals or users authorized in legal proceedings. Such records can include materials such as X-Rays and other photographic records. All such records are private and confidential information regulated by federal and state patient privacy laws. Thus, reproduction of such records involves significant administrative costs to health care practitioners. Florida law limits the amount that can be charged by a practitioner for the reproduction and provision of copies.<sup>1</sup> The statute authorizes the practitioner's licensing board to specify limitations by administrative rule. For Medical Doctors, the Board of Medicine in the Department of Health (DOH) is the board responsible for such rulemaking.

After nine hearings conducted between August 2, 2013, and February 6, 2015, the Board of Medicine on March 12, 2015, filed a final version of a revision to its rule limiting physician charges for such records.<sup>2</sup> The rule was challenged in to separate administrative proceedings and a decision the consolidated cases was entered December 8, 2015, upholding the rule as a valid exercise of the Board's authority. The Board filed the rule for adoption the following day with the Department of State.

The revised rule, if it goes into effect, would increase the cost of such copies to \$1.00 per page for all records. Since 1988, the rule has limited charges for patients and governmental entities to \$1.00 per page for the first 25 pages and 25 cents per page for each page in excess of 25.<sup>3</sup> That rate was increased only for other entities to \$1.00 per page in 2009.<sup>4</sup>

##### Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.<sup>5</sup> Rulemaking authority is delegated by the Legislature<sup>6</sup> through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"<sup>7</sup> a rule. Agencies do not have discretion whether to engage in rulemaking.<sup>8</sup> To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.<sup>9</sup> The grant of rulemaking authority itself need not be detailed.<sup>10</sup> The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.<sup>11</sup>

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<sup>1</sup> Section 456.057(17), F.S.

<sup>2</sup> "Additional Statement to the Secretary of State" included with "Certificate of Board of Medicine Administrative Rules" filed December 9, 2015. A copy of the Certificate and the Additional Statement are available in the offices of the Rulemaking Oversight and Repeal Subcommittee.

<sup>3</sup> The 1988 rule may be found at: [https://www.flrules.org/gateway/notice\\_Files.asp?ID=2414541](https://www.flrules.org/gateway/notice_Files.asp?ID=2414541).

<sup>4</sup> 64B8-10.003, F.A.C. Accessed on January 11, 2016, at: [https://www.flrules.org/gateway/notice\\_Files.asp?ID=6848605](https://www.flrules.org/gateway/notice_Files.asp?ID=6848605).

<sup>5</sup> Section 120.52(16); *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1<sup>st</sup> DCA 2007).

<sup>6</sup> *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1<sup>st</sup> DCA 2000).

<sup>7</sup> Section 120.52(17).

<sup>8</sup> Section 120.54(1)(a), F.S.

<sup>9</sup> Section 120.52(8) & s. 120.536(1), F.S.

<sup>10</sup> *Save the Manatee Club, Inc.*, supra at 599.

<sup>11</sup> *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

An agency begins the formal rulemaking process by filing a notice of the proposed rule.<sup>12</sup> The notice is published by the Department of State in the Florida Administrative Weekly<sup>13</sup> and must provide certain information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule's adverse effect on specified aspects of the state's economy or increase in regulatory costs.<sup>14</sup>

The economic analysis mandated for each SERC must analyze a rule's potential impact over the 5 year period from when the rule goes into effect. First is the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.<sup>15</sup> Next is the likely adverse impact on business competitiveness,<sup>16</sup> productivity, or innovation.<sup>17</sup> Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.<sup>18</sup> If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed \$1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."<sup>19</sup> A rule must be filed for adoption before it may go into effect<sup>20</sup> and cannot be filed for adoption until completion of the rulemaking process.<sup>21</sup> A rule projected to have a specific economic impact exceeding \$1 million in the aggregate over 5 years<sup>22</sup> must be ratified by the Legislature before going into effect.<sup>23</sup> As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

### SERC for Rule 64B8-10.003

At its December 4, 2014, hearing, the Board determined that a SERC should be prepared for the rule. The Board approved the SERC on February 6, 2015. The SERC estimates increased annual costs to DOH for its regulatory investigations of almost \$100,000 annually, increased annual costs in civil litigation of about \$300,000, and increased annual costs of about \$250,000 in Social Security disability cases.<sup>24</sup> While these costs are economically offset by equal gains to medical practices so that the impact on the Florida economy is neutral, it is appropriate to evaluate regulatory cost impacts by totaling the impacts on negatively affected parties. On March 12, 2015, the Board filed a Notice of Change indicated that the rule appeared to require legislative ratification.<sup>25</sup>

The bill ratifies the rule as filed, making the rule effective upon the bill's becoming law.

## B. SECTION DIRECTORY:

Section 1: Ratifies Rule 64B8-10.003, F.A.C., solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S. Expressly limits ratification to the effectiveness of the rules. Directs the act shall not be codified in the Florida Statutes but only noted in the historical comments to each rule by the Department of State.

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<sup>12</sup> Section 120.54(3)(a)1, F.S.

<sup>13</sup> Section 120.55(1)(b)2, F.S.

<sup>14</sup> Section 120.541(2)(a), F.S.

<sup>15</sup> Section 120.541(2)(a)1., F.S.

<sup>16</sup> This includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

<sup>17</sup> Section 120.541(2)(a) 2., F.S.

<sup>18</sup> Section 120.541(2)(a) 3., F.S.

<sup>19</sup> Section 120.54(3)(e)6. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.

<sup>20</sup> Section 120.54(3)(e)6, F.S.

<sup>21</sup> Section 120.54(3)(e), F.S.

<sup>22</sup> Section 120.541(2)(a), F.S.

<sup>23</sup> Section 120.541(3), F.S.

<sup>24</sup> A copy of the SERC is available in the offices of the Rulemaking Oversight and Repeal Subcommittee.

<sup>25</sup> Notice of Change, accessed on January 11, 2015, at [https://www.flrules.org/gateway/notice\\_Files.asp?ID=15773963](https://www.flrules.org/gateway/notice_Files.asp?ID=15773963).

Section 2: Provides the act goes into effect upon becoming law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill creates no additional source of state revenues.

#### 2. Expenditures:

If ratified, the SERC anticipates regulatory costs to DOH investigative activities of about \$100,000, less whatever might be recoverable therefor by costs assessments against licensees disciplined or entering into consent orders in such matters.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill itself has no impact on local government revenues.

#### 2. Expenditures:

The bill itself does not impose additional expenditures on local governments.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

If ratified, the rule appears to have a neutral economic impact on the private sector. However, this impact results from increased costs to some actors being offset by the physicians' receipt of the authorized increased charges.

### D. FISCAL COMMENTS:

According to the SERC, if the rule is ratified, the regulatory costs to all parties expected to incur increased medical records charges may exceed of \$650,000 annually.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

The legislation does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

#### 2. Other:

### B. RULE-MAKING AUTHORITY:

This bill does not grant additional rulemaking authority.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES